

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

California Rules of Court, rule 8.1115(a), prohibits courts and parties from citing or relying on opinions not certified for publication or ordered published, except as specified by rule 8.1115(b). This opinion has not been certified for publication or ordered published for purposes of rule 8.1115.

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FIVE

THE PEOPLE,

Plaintiff and Respondent,

v.

GERALD PICKETT,

Defendant and Appellant.

B290771

(Los Angeles County
Super. Ct. No. BA464867)

APPEAL from a judgment of the Superior Court of Los Angeles County, William N. Sterling, Judge. Affirmed and remanded.

Stephane Quinn, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Lance E. Winters, Senior Assistant Attorney General, Zee Rodriguez, Supervising Deputy Attorney General, Stephanie C. Santoro, Deputy Attorney General, for Plaintiff and Respondent.

The Los Angeles County District Attorney charged defendant and appellant Gerald Pickett (defendant) in a three-count information alleging second-degree robbery (Pen. Code,¹ § 211), misdemeanor battery (§ 242), and misdemeanor resisting a peace officer (§ 148, subd. (a)(1)). Following defendant's conviction, the trial court sentenced him to a prison term and the sentence included a five-year enhancement, pursuant to section 667, subdivision (a)(1), for sustaining a prior serious felony conviction. The parties agree defendant is entitled to a remand so the trial court may consider whether to exercise recently conferred discretion to strike the five-year prior conviction enhancement, and that is what we shall do.

I. BACKGROUND

Jose Alvarez (Alvarez) owns and operates a store in Los Angeles. One morning in January 2018, Alvarez heard a mannequin fall in the front of the store. He noticed that someone, later identified as defendant, had removed a dress and necklace from the mannequin. When Alvarez confronted defendant, defendant punched Alvarez and ran away with the dress and necklace.

Evaristo Tapia (Tapia), Alvarez's son who was helping out at the store, ran outside when he heard Alvarez call for help. Tapia saw defendant with the items and chased him. Alvarez called the police.

Tapia eventually caught up with defendant in an alleyway and told defendant to return the clothing. Defendant threw the clothing at Tapia and punched him repeatedly. Tapia fought

¹ Undesignated statutory references are to the Penal Code.

back and defendant again ran away. Police officers in the area then caught defendant and took him into custody.

A Los Angeles jury convicted defendant of the aforementioned charges: robbery, misdemeanor battery, and misdemeanor resisting a peace officer. Defendant separately admitted to suffering a 2010 conviction for burglary. The trial court sentenced defendant to seven years in prison on the robbery conviction: the low-term of two years, plus the five-year enhancement pursuant to section 667, subdivision (a)(1) for the prior serious felony conviction. (The court imposed concurrent sentences for the misdemeanor battery and resisting a peace officer convictions.) Reasoning that “any additional time in custody would be excessive due to the nature of the actual offense,” the court exercised its discretion to strike an allegation that defendant’s prior felony conviction constituted a “strike” under the Three Strikes law (§§ 667, subd. (b)-(i), 1170.12) and an allegation that defendant served a prior prison term within the meaning of section 667.5, subdivision (b).

II. DISCUSSION

Defendant argues a remand is required to give the trial court an opportunity to exercise discretion conferred by Senate Bill 1393, which authorizes a trial court to strike a section 667, subdivision (a) sentencing enhancement if found to be in the interest of justice within the meaning of section 1385. The Attorney General concedes that the changes in law worked by Senate Bill 1393 apply retroactively and that, on this record, defendant is entitled to the remand he seeks. We accept the concession.

At the time defendant was sentenced, imposition of the section 667, subdivision (a)(1) five-year enhancement for sustaining a prior serious felony conviction was mandatory. (Former § 1385, subd. (b), amended by Stats. 2018, ch. 1013, § 2, eff. Jan. 1, 2019 [“This section does not authorize a judge to strike any prior conviction of a serious felony for purposes of enhancement of a sentence under Section 667”].) After defendant’s sentencing, the Governor signed Senate Bill 1393, which deletes the provision of section 1385 that makes imposition of a section 667 prior serious felony conviction enhancement mandatory (as well as related language in section 667 itself), thereby permitting trial courts to strike such enhancements when found to be in the interest of justice. (Sen. Bill No. 1393 (2017-2018 Reg. Sess.) §§ 1, 2.) The legislative changes made by Senate Bill 1393 took effect on January 1, 2019.

Senate Bill 1393 applies retroactively to defendant under the principles espoused in *In re Estrada* (1965) 63 Cal.2d 740 and *People v. Francis* (1969) 71 Cal.2d 66, 76. (*People v. Garcia* (2018) 28 Cal.App.5th 961, 972-973.) Because the record provides no clear indication the trial court would refuse to exercise in defendant’s favor the discretion conferred by Senate Bill 1393 (compare *People v. Gutierrez* (1996) 48 Cal.App.4th 1894, 1896), a limited remand is appropriate.

DISPOSITION

The cause is remanded to the trial court to permit the court to consider whether to exercise its discretion to strike defendant's section 667, subdivision (a)(1) enhancement under section 1385. In all other respects, the judgment is affirmed.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

BAKER, J.

We concur:

RUBIN, P. J.

MOOR, J.